IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 474 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE R.H.SHUKLA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? YES

2 To be referred to the Reporter or not ? YES

3 Whether their Lordships wish to see the fair copy of the judgment ? NO

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? NO

5 Whether it is to be circulated to the civil judge ? NO

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RAFIK YAKUBBHAI SHAIKH - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
Ms. Sadhana Sagar, learned advocate, appointed by Legal Aid Committee for Appellant
MR. R.C. KODEKAR, APP, for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE R.H.SHUKLA

Date : 27/12/2007

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.H.SHUKLA)

The present appeal is directed against the judgement and order dated 7.5.1999 passed in Sessions Case No. 177 of 1998 by the learned Sessions Judge, Rajkot, recording conviction of the appellant (for short accused) for offence under Section 302 of the Indian Penal Code and sentenced to imprisonment for life and fine of Rs. 20,000/- and in default of payment of fine to undergo rigorous imprisonment for seven years.

2. The short facts of the case briefly stated herein are that the original accused was charged with having committed offence under Section 302 of the Indian Penal Code and under Section 135 of the Bombay Police Act, as stated in detail in the charge framed by the Sessions Court. It is alleged that on 24.5.1998 the

accused had committed the aforesaid offence and killed his real sister on the terrace of the house at Vithrang Society, Varia plot, Rajkot. The accused was also accused for murder of a minor child by knife blow and ultimately was acquitted. However, the family members of the accused were not happy regarding his involvement in such incident and they had to suffer inasmuch as they had to vacate the premises where they were living earlier because of such incident involving the accused in such a heinous crime. Therefore, on 23.5.1988 at about 6 O'clock in the evening when the accused visited the house situated at Vitrang Society, Rajkot, his deceased sister Salma is said to have stated that as he is murderer he should not enter the house and visit them and there was some quarrel. Thereafter, he stayed on that day at his house where the deceased sister Salma was sleeping on the terrace and the accused was also sleeping on the terrace whereas other members of the family were sleeping downstairs. The accused annoyed with the

displeasure shown by the deceased sister Salma and the quarrel and also the attitude of the other family members, was angry and agitated and therefore committed murder of the his sister with a knife blow on vital part – cutting blood vessel and trachea, cavotid arteries on both sides are cut down, Hyoid bone raptured. Thereafter, when the other members of the family including father of the accused herein as well as his deceased sister Salma, hearing the shout of the deceased, reached the terrace and saw the accused with knife in his hand and the dead body of the deceased in pool of blood. Therefore, the father of the accused herein informed the police by telephoning and lodged the complaint at Exh. 12.

3. On the basis of the complaint, investigation was carried out. As sufficient incriminating evidence was found against the accused for commission of the offence punishable under Section 302 of IPC, charge-sheet came to be filed in the Court of learned Judicial

Magistrate, First Class, Rajkot. However, as the offence under Section 302 of Indian Penal Code is exclusively triable by the Court of Sessions, the learned Judicial Magistrate First Class, Rajkot, committed the case to the Court of Sessions, Rajkot.

4. Charge was framed which was read over and explained to the accused. The accused pleaded not guilty to the charge and claimed to be tried. Therefore, the accused was tried by the learned Sessions Judge in Sessions Case No. 177 of 1998.

5. In order to bring home the charge levelled against the accused, the prosecution has examined the witnesses, inter alia:

(1) Yaqubbhai Dinmomahmahed PW-1 (complainant) (father of the accused and the deceased) (an eye witness)

(2) Aminaben PW-2, Exh. 50 (mother of the accused and the deceased)

(3) Momahmahed Yaqubbhai Shaikh, PW-3, Exh. 56

real brother of the accused as well as the deceased

(4) Dr Manishbhai Kantigiri Gosai, Exh. 61, Medical Officer conducted the post mortem

(5) Babubhai Ravjibhai Rana PW-5, Panch witness of the discovery panchnama at Exh. 81

(6) Dhansukhbhai N. Kachot, PW-11, Exh. 112, police constable who sent wireless message to Rajkot Taluka Police Station,

(7) Dilipsingh Pathubha Jadaja PW-12 who received the message from control room and made entry in the station

(8) Sajubha Kanubha Zala PW-13 Exh. 120 who made report under Section 157 Exh. 120

(9) Parbatsingh M. Chavada, PW-14, Exh. 125

(10) Atamaram Pandurang Pawar PW 15 Exh. 129 Police Sub-Inspector, Rajkot Taluka Police Station who carried out the investigation and submitted the charge-sheet.

6. After recording the evidence of the prosecution witness, further statement of the

accused under Section 313 of the Cr. P.C. was recorded. He has stated that he has been falsely implicated as he had demanded some amount from his father. It is also stated that the receipt of fixed deposit for Rs. 25,000/- is with the father and to see that it may not have to be given or paid, he has been falsely implicated.

7. The learned Sessions Judge, Rajkot, on appreciation and evaluation of the evidence and after hearing the learned advocate for the accused as well as the learned Public Prosecutor passed the impugned judgement and order recording the conviction as stated hereinabove and sentenced the accused to imprisonment for life for offence under Section 302 of the Indian Penal Code.

8. It is, this judgement which has been challenged on the ground mainly emphasised by Ms. Sadhana Sagar, learned advocate, that the accused was aged only 18 years and was of a tender age

and therefore due to sudden provocation he committed the offence of murder. However, considering the age of the accused and the circumstances the appeal may be allowed and instead of conviction under Section 302 of the Indian Penal Code, it may be accepted as an offence under Section 304 Part-A of the Indian Penal Code. The learned advocate for the accused for that purpose referred to the complaint at Exh. 12 and the deposition of PW-1 father of the accused (complainant) and also referred to the deposition of Aminaben (mother of the accused) at Exh. 13, the brother of the accused and the deceased sister at Exh. 56 witness regarding panchnama for the scene of offence as well as inquest panchnama at Exh. 31 The learned advocate has also referred to the deposition of Dr. Manish Gosai PW-4, Exh. 16 who had performed postmortem which is at Exh. 17.

9. The learned advocate referring to this evidence on record tried to submit that because

of the tender age, the accused who is the real brother committed the offence of murder of his own sister as he was annoyed with the attitude of the family members and particularly the deceased sister Salma when she quarreled with him saying that he should not enter the house as he is murderer having committed the heinous crime of murder of minor child earlier. The learned advocate has emphasised that there was no motive and it was a sudden provocation after the quarrel which led to his incident and looking to the tender age of the accused, the conviction under Section 302 of the IPC may be altered into an offence under Section 304 Part -I of the IPC. The learned advocate for the accused strenuously submitted that it is a case of single blow and therefore as there was a sudden provocation and there is no motive of committing offence, the learned trial Judge could not have recorded conviction under Section 302 of IPC and it should have been under Section 304 Part A of the IPC and therefore it is prayed that the conviction may be

altered to offence under Section 304 Part-I of the IPC instead of Section 302 of IPC.

10. Mr. R.C. Kodekar, learned Additional Public Prosecutor has submitted that this Court may consider the fact that it is a case of murder by a real brother of his own real sister. It was pointed out that it is not a case of sudden provocation and it is a cold blooded murder. Mr. R.C. Kodekar, learned APP, emphatically submitted that the incident or the quarrel between the accused and the deceased was on the previous day and it is a fact that he was involved in a heinous crime of murder of a minor boy though he might have been acquitted. For this reason, his family members were not happy and he stayed at the house on that night and at the early hours of the morning when the deceased Salma was sleeping on the terrace he was also sleeping there and he committed brutal murder by cutting of blood vessel and trachea with knife. The learned APP therefore submitted that it is

required to be appreciated that it is a blow on the vital part and the time, space and the weapon would clearly indicate about his motive that he selected the time where nobody could be around and he achieved his purpose. This would reflect that it is a cold-blooded murder committed with clear intention or the motive and therefore the submission made by the learned advocate for the accused cannot be accepted.

11. The learned APP also referred to the inquest panchnama at Exh. 31 as well as deposition of Dr. Manish Gosai at Exh. 16 and the postmortem report at Exh. 17. He pointedly referred to th cause of death which is stated to have been due to cut wound through major blood vessels and trachea. The learned APP referred to the deposition of Dr. Manish Gosai PW 4 at Exh. 16 who performed the postmortem and submitted that he has specifically stated in his evidence referring to the muddamal article 10 knife that such injury could be caused with such a weapon –

knife. He has also stated that the injury which is found on the neck of the deceased referred to in the postmortem report could be caused with knife – muddamal article 10. Therefore, the medical evidence has supported the theory of the prosecution. The learned APP also referred to the deposition of the father PW-1 (complainant) at Exh. 11 and submitted that he has specifically narrated about what had transpired in his deposition. He has stated that he has seen the accused with knife and in the cross-examination though it was suggested that he has not been an eye witness to the incident he has clarified that aspect. He has stated in his deposition that on hearing the shout of the deceased “bapu bapu”, he went to the terrace and saw the accused sitting on the deceased with a knife in his hand and the deceased was lying in pool of blood. He has further stated in his deposition that when he asked the accused Rafiq as to what he has done; the accused is said to have stated that the deceased Salma (sister) had quarreled with him

that he should leave the house therefore he has finished her. Though the submissions have been made about some discrepancy or improvisation regarding his narration and version in the complaint given by the complainant which is at Exh. 12 and the deposition on Exh. 11, in the cross-examination he has specifically clarified and stated that he has not mentioned in the complaint at Exh. 12 that the accused was sitting on the deceased and has stated that he was standing with knife in his hand. Therefore, even in the cross-examination he has been consistent about the presence of the accused with knife. Further he has denied the suggestion that he has not seen the accused or he cannot say as to who has given the blows causing injuries to the deceased.

12. In view of the rival submissions made by both the sides and on appreciation and scrutiny of the material and evidence on record it is required to be considered whether the judgement

and order given by the learned Sessions Judge, Rajkot calls for any interference.

13. For that purpose the submission made with much emphasis by the learned advocate for the accused that Yaqubbhai Dinmomahmahed (complainant – father) PW – 1 in his deposition Exh. 11 has made improvisation from the complaint Exh. 12 and therefore his evidence may not be accepted, is required to be appreciated. The close look at the deposition of Yaqubbhai Dinmomahmahed PW-1 (complainant – father) at Exh. 11 and complaint at Exh. 12 would reveal that there may be some difference in the version but there is no infirmity in his deposition. The complaint at Exh. 12 is given by the complainant father who is examined as PW-1. Complainant – father PW-1 in his deposition at Exh. 11 has narrated about what had transpired in his deposition. He has stated that he has seen the accused with knife and in the cross-examination though it was stated that he has not been an eye witness to the incident,

he has clarified and stated that on hearing the shout “Bapu” “Bapu” he rushed to the terrace and saw the accused sitting on the deceased with knife in his hand. He has specifically clarified on this aspect and stated that he has not mentioned in detail in his complaint at Exh. 12 that the accused was found sitting on the deceased at that time but he has stated that he was standing there with knife in his hand. Therefore, even in the cross-examination he has been consistent about the presence of the accused with knife. He has also remained consistent about the fact that he rushed to the terrace on hearing the shout and himself has witnessed the accused with knife and the deceased daughter lying in pool of blood. Therefore, he has specifically denied the suggestion put to him in the cross-examination that he has not seen the accused or he cannot say as to who has given blows causing injuries to the deceased. Therefore, as rightly discussed in the impugned judgement, there is no infirmity in the deposition of the complainant –

father Yaqubbhai Dinmomahmahed who is examined as PW-1.

14. He has also denied the suggestion put to him in the cross-examination that the accused had not come to the house and had not stayed at the house. He has stated that the accused had visited the house on the previous day in the evening at about 6 O'clock when he had gone out and the deceased daughter was at the house and there was a quarrel between the deceased and the accused (brother) when the deceased sister had asked the accused as to why he has come and he should not visit the house as he has been involved in a heinous crime of murder of child.

15. The evidence of the complainant (father of the accused) is supported by the deposition of Aminaben PW-2 (mother) and also brother.

16. The case of the prosecution as discussed and deliberated in the judgement also makes it

evident that the discovery panchnama at exh. 25 under Section 27 of the Evidence Act was also made and knife – muddamal article 10 recovered at the instance f the accused. The discovery panchnama Exh. 25 also refers to this aspect and blood stains have been found on the knife. The panchnama of the scene of offence at Exh. 27 refers to the fact about the blood stains having been found on the parapet and the bed where the deceased was sleeping. This has further been corroborated by the FS Report (serological report).

17. The postmortem report is at Exh. 70 and the cause of death clearly mentioned due to cut wound through major blood vessel and trachea. Dr. Manish Gosai who performed the postmortem PW-4 is examined and he has stated in his deposition Exh. 60 that the main blood vessel “windpipe” having a cut wound suggesting the injury on the neck. He has stated that such an injury was sufficient to cause death and referring to injury No. 2 in the

postmortem report he has specifically stated that such injury could be caused with knife – muddamal article 10, though in the cross-examination the suggestion has been put that the injury No. 2 could not be caused unless knife or sharp edged weapon is having sharp edges on both the sides. He has clarified that injury No. 2 could be caused with a weapon like muddamal article 10 – knife. He has denied the suggestion that if such a weapon was having sharp edge on both the sides only then such injury could be caused.

18. The learned advocate for the accused however has submitted that it was a grave and sudden provocation and considering the age of the accused that he was of a tender age, the conviction may be altered from Section 302 to Section 304 Part-A of the IPC. Though this submission has been made, the learned advocate has not been able to carry further to satisfy this Court as to how it could be said to be grave and sudden provocation. The term “grave” as well

as “grave and sudden provocation” has been considered and deliberated at length in a catena of the decisions of the Hon'ble Supreme Court which lay down and clarify as to what could be said to be grave and sudden provocation. It has been well settled that the word “grave” would mean that provocation must be grave, i.e. Of such a nature as to deprive the accused of the power of self-control. Therefore, a bare statement made by the accused that he regarded the provocation as grave will not be accepted by the Court. The Court has to apply an objective test for deciding whether the provocation was grave or not. There can be no universal rule as to what may amount to sufficient provocation so as to reduce the murder into a culpable homicide. The test in all such cases firstly whether the accused was subject to such a provocation as to cause a reasonable man to do what he did and secondly, whether the provocation was such that it influenced him so to act.

19. The word “provocation” according to Oxford Dictionary means an action, insult, etc. held to be likely to provoke physical retaliation Lord Viscount Simon has observed that “the whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control, whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived. Provocation in law consists mainly of three elements: (i) the act of provocation; (ii)the loss of self-control (iii) the retaliation proportionate to the provocation.

20. It has been observed in MANCINI VS. DIRECTOR OF PUBLIC PROSECTUIONS (1942) AC 1; HOLMES VS. DIRECTOR OF PUBLIC PROSECUTIONS (1946) 2 All ER 124. Viscount Simon has laid down “it is not all provocation that will reduce the crime of murder to manslaughter. Provocation, to have that result, must be such as temporarily deprives the person provoked of the power of self control, as

the result of which he commits the unlawful act which causes death..... The test to be applied is that of the effect of the provocation on a reasonable man, so that an unusually excitable or pugnacious individual is entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance (i) to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (ii) to take into account the instrument with which the homicide was effected, for to effort, in the heat of passion induced by provocation.

21. It is required to be appreciated that in order to apply this doctrine and fall in the exception, the law requires both grave and sudden provocation. The word used is “and” between the words grave and sudden provocation meaning thereby it is not disjunctive would necessarily imply that before this doctrine could be applied

for falling a case in the exception, the law requires that it is to be both:

(i)provocation must be of a grave nature that one would lose his control;

(ii) further it is to be sudden.

22. It has also been well accepted principle and the Courts have while expressing the word of caution, observed that that law cannot permit ill-temper and other abnormalities to become assets for the purpose of committing murder, for if it did, a bad tempered man would be entitled to a lighter verdict of manslaughter where a good tempered one would be convicted for murder.

23. Thus, in the facts of the present case, there was exchange of words between the deceased and the accused on the previous day evening. After that the accused is said to have supper with the family and thereafter he went to sleep on terrace where the deceased (sister) was

sleeping. Therefore, considering the lapse of time and the incident/quarrel which is said to have been taken place between the deceased sister and the accused on the previous day evening would not be said to be a grave provocation for such a nature that accused can be said to have lost his self control. Moreover, the word “sudden” involves two elements (i) provocation must be unexpected; (ii) interval between the provocation and homicide should be brief. If the accused has killed the deceased in the manner as stated above, after a lapse of time hours after the quarrel, it is not a case of sudden provocation. So by no stretch of imagination it can be said to be a grave and/or sudden provocation as contended.

24. In the facts of the present case, there was no grave and sudden provocation as the accused had visited his house on the previous day in the evening when the deceased sister Salma is said to have asked him as to why he has visited

the house and the family has asked him not to visit them after his involvement in a heinous crime of murder of young boy aged 10 years. There was some quarrel on this aspect but admittedly thereafter the accused is said to have stayed at his house, had supper with family members and thereafter both the deceased and the accused are said to have gone to sleep on the terrace. Therefore, much time has lapsed between the quarrel or exchange of the words between the deceased sister and the accused. Therefore, it cannot be said to be a sudden provocation that in a heat of passions or the excitement the accused had reacted. However, on the contrary the accused having taken supper with the family members had gone to sleep and pondering over the quarrel and the fact that the deceased sister had asked him as to why he has come when it is not liked by his family members after his involvement in the murder of young boy aged 10 years he has been annoyed and agitated not able to accept that fact. Further, Yakubbhai PW-1 (father) who is an

eye witness to the incident and who had rushed to the terrace on hearing the shouts of the decease – “Bapu, Bapu”, has seen the accused with knife and the deceased in the pool of blood.

25. PW-1 Yakubbhai (father) in his deposition at Exh. 11 narrated the incidence has also stated that when he reached the terrace he found the deceased injured lying there and the accused with a knife in his hand sitting on the deceased. He has further stated that when he asked the accused as to what he has done the accused is said to have stated to the witness (father) that the deceased Salma had a quarrel with him as to why he has visited the house and he should leave the house for which he had finished her. This is an extra-judicial confession made by the accused to the eye witness – father on that very point of time and that would leave no doubt that it is because of the quarrel in the evening he had committed the murder and therefore it cannot be said to be a grave and sudden provocation by any

stretch of imagination.

26. Another facet of the argument about the tender age of the accused that he was aged 18 years is without any merit inasmuch as the accused is said to have involved in murder of a young boy aged 10 years though he was acquitted but the family members had to pass through the trauma and shifted the residence and therefore he was not welcome in the family and the family members had not liked his visiting the house at new place. The deceased sister Salma is said to have stated to him when he visited the house on the previous evening as to why he visited when the family has not approved or liked his visiting the house. Yakubbhai PW-1 in his deposition Exh. 11 has also sated that after his involvement in the heinous crime of murder of young boy aged 10 years, the family had not liked his visiting the house. He has specifically stated that they had refused to permit the accused in the house. Therefore, the submission that the accused is of

a tender age which may be considered does not appeal to this Court. If the accused who was involved in a heinous crime though acquitted, subsequently had been asked not to visit the family and the family had not liked his visiting the house and in spite of that he not only visited the house, stayed there and when there is a quarrel between the accused and the deceased younger sister he has committed this crime again which again reflects his attitude. He cannot have any reason to kill the younger sister mercilessly at late night merely because she had a quarrel in the evening for a justifiable reason. Therefore, this submission has no merits.

27. In view of the discussion made hereinabove and the reasoning given in the impugned judgement recording conviction of the accused for offence under Section 302 of IPC, we are of the opinion that it does not call for any interference in this appeal and the present appeal deserves to be dismissed. The judgement

and order recording the conviction of the accused by the learned Sessions Judge, Rajkot is hereby confirmed. Hence the present appeal hereby stands dismissed.

(A.M. KAPADIA, J)

(R.H. SHUKLA, J)

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